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ABSTRACT

Several paradoxes in the treatment of administrative information by universities are discussed. Since certain types of information have important economic value to educational institutions, there develops a conflict of interests, a collision between the schools' fiduciary responsibility for their students and their institutional responsibility to survive and, if possible, thrive. History seems to suggest that, where the control of information is concerned, most schools chose to opt for survival. Prior to regulation, virtually all schools maintained absolute domination of the flow of administrative information between their students and themselves. This fact alone should explain the recent imposition of outside regulation, and should vitiate schools' claims that such regulation somehow interferes with their educational function. Where difficulty remains is in the law itself. While it has responded to a problem that is one of economic valuation, of sociological distribution of power, that response has not consistently been phrased in the terms of the problem. By focusing attention on privacy rather than power, on access rather than flow, legislation like the Buckley Act diverts attention from the actual nature of the underlying difficulty. Until the legal remedy more closely fits the nature of the ailment, paradoxical symptoms will continue to cause trouble. (Author/MSE)

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LEGAL ASPECTS OF THE REGULATION OF INFORMATION FLOW IN THE STUDENT-UNIVERSITY RELATIONSHIP

by

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SOME PARADOXES

Universities are institutions devoted to the generation, preservation, and transfer of information. And yet, in their internal management they evidence no greater understanding of the potential power inherent in information than does any commercial enterprise dealing in widgets.

Universities have traditionally had a parental role with respect to the governance of the lives of their students. In particular, even after the demise of the loco parentis model of student-school relations, they continue to maintain plenary and unilateral control over the contract that has taken the place of the parental bond. There remains an important concern for the well-being of their charges, what lawyers would call a fiduciary responsibility. And yet, in their iron-clad control of information transfer they manifest concern only for their own interests, often to the detriment of their students.

More than any other group, researchers understand the value of data, its usefulness, maleability, manipulability. They understand that data once collected can be used and re-used without in any way diminishing their substance. They understand that conclusions drawn from data can have an important impact on judgments about the real world. And yet, universities are communities of researchers who seem to ignore all of these facts when dealing with the information provided to and by their students.

These paradoxes are not unlinked. They emerge from a common dichotomy within educational institutions, a split between education and management, between teachers and administrators. Educationally, information is the life's blood of higher education. Its value and its power are manifest. But administratively, information is just one of many means to the end of institutional survival. Like all good corporate managers, university administrators seek to control information flow to their own advantage. Unlike most managers, however, they have been almost completely successful. Now the law is beginning, haltingly, to recognize the importance of personal information. And, characteristically, university managers, like the spokesmen for insurance companies, credit bureaus, and direct mail advertisers, have reacted with hostility.

That hostility is defensible. The strength of the university, its ability to preserve and pass along the information for which it exists even in times of adversity, lies precisely in its freedom from government regulation. Increasing regulation of any aspect of a university's functioning presents a tangible threat. To the extent that this is so, it is right for higher education to bristle at the geometric increase in federal control of its operation. But in order to remain immune from the kind of regulation that is imposed on all business, the management of universities must remain immune to pure business orientation. It must be informed, and controlled, by an awareness of the values on which the institution is built. In the realm of information transfer, its administrative policies must be determined

by its unique understanding of the value and power inherent in that process.

SOME EXAMPLES

Administrative information flow in universities is most dense around the admissions process. Highly selective schools require large amounts of information about applicants as a way of deciding among them. Specialized sorts of personal information have been developed to serve these particularized inquiries. SAT, ACT, MCAT, LSAT, GMAT, GRE, the litany is all-encompassing. In addition, many admissions processes require interviews, recommendations, writing samples, descriptions of highly personal events such as arrests, academic dismissals or sanctions, medical and psychological histories.

Less selective schools often seek the same data, not as a gatekeeping filter, but simply as background data about the people being admitted. The basis of the academic file begins with this sort of self-reported information

At the same time, information about the school is largely controlled by the school itself. The only organized sources of institutional information are the institutions. And they are far from disinterested parties. Public relations is rapidly becoming the name of the student recruitment game, and applicants and potential applicants are barraged with information about schools generated by the schools themselves. Even the seemingly objective sources of information, published by the College Board or the Law School Admission Council or even by entrepreneur-

ial commercial enterprises, virtually always derive the vast majority of information from official sources at the school involved.

The flow of information in the admissions process is two-way, but the control of that flow is unilateral. Students must yield the data required for either consideration or admission. Schools need only disseminate that information which places the institution in the most favorable light, or which costs least to produce, or which typifies the school as it wishes it were rather than as it actually is.

Once admitted, the picture changes very little, though the transactions become less frequent. Information about school rules, policies, administrative actions, continues to be regulated by the institution. Students have no right of access, as a general rule, to minutes of faculty or Board meetings, they cannot as a matter of right or of common practice find out about a school's holdings, its financial management, its budgetary policies. Tuition is set by the institution, presumably to cover costs, but students seeking a better understanding of the basis of their tuition cannot unearth the details (or often even the general contours) of the costs that the tuition theoretically covers.

Simultaneously, information, in the form of evaluations if nothing else, is being generated about the student by the institution. In the unregulated institution--the pre-Buckley era--that information was often unavailable to the students in any form other than a summary of grades. Other, softer data--personal evaluations, internal notes, financial data, medical

and psychological records--were beyond the pale.

Though these records about students were not shown to the people involved, they were available to others at the discretion of the record keeper. Employers, investigators, campus and local police might have access. And others might be denied access. Even post-Buckley, virtually all institutions refuse to issue official transcripts for students whose loan payments are behind or in default. Many refuse even to issue the kind of unofficial record that the Buckley regulations seem to mandate.

Wherever personal information is involved in higher education, wherever data are used administratively rather than educationally, the access valve has always been controlled by one party to the student-school relation. Schools control what comes in and what goes out, and, as in the case of the withheld transcripts, they often do so to favor their own economic interests in the way that any business would.

This fact, that universities act as would any business given the same opportunity to control information flow, has led to separately devised but conceptually linked legislation in two areas. The control of information about students has been regulated by the Buckley Amendment (the Family Educational Rights and Privacy Act). The control of information about the institution has been regulated (tentatively and uncertainly) by the Student Consumer Information Regulations (pursuant to the Education Amendments of 1974). Taken together, these two sets of regulations radically alter the traditional balance of information power in higher education.

TWO LAWS

The Buckley Act was passed (and amended) in 1974, taking full effect on January 1, 1975. Regulations governing the Act were promulgated in the Spring of 1976. It has been discussed and described in great detail in a variety of forums, so it will merely be sketched here.

It relates to the regulation of "education records," maintained by educational institutions about students or former students. Education records are defined somewhat circularly as any records maintained in any personally identifiable manner by any educational institution about students or former students. An educational institution under the act must be receiving federal aid and must have "attending students."

Under this definition, applicants are not covered by the Act. Furthermore, since the Act was written primarily with elementary and secondary schools in mind, most rights are granted to the parents rather than the students. For higher education institutions, however, the rights are virtually all transferred to the student.

The rights involved cover three distinct areas: access, content, and dissemination. In essence, the Act provides that students should have access to all personally identifiable records about themselves maintained by any educational institution (there are some minor exceptions for personnel records, campus police records, and some medical records, provided that no one else has access to those records either). Furthermore, it provides a

framework for the creation of a system providing students the right to challenge the content of any material in their files, with an elaborate appeal process and a right to include a rebutting statement should the student lose his or her challenge. Finally, it permits students to control the persons to whom information from their education records may be released, and the uses to which such release may be put.

The Act is quite comprehensive, and its implementing regulations are detailed. It embodies an intriguing approach to federal regulation, one which is particularly sensitive to schools' distaste for outside control. It requires schools to generate their own internal rules implementing certain specified substantive rights. No particular procedures are mandated, and conceivably a very broad spectrum of possible policies might all fulfill the requirements of the Act equally well.

Finally, the Act is backed by rather unworkable sanctions. Failure to comply with its requirements may lead to a proceeding before the Department of Health, Education, and Welfare, which might in turn lead to the cutting off of all federal aid to the institution. That ultimate punishment is so Draconian, and the process for complaint so time-consuming, that it is hard to believe that any complaint could actually end in a successfully pressed enforcement proceeding. Furthermore, since the Act requires only the creation and implementation of an internal policy, it is at least technically the case that so long as such a policy is in place an institution is fulfilling the terms of the Act no matter how poorly enforced the policy is. The net result is that a com-

plainant has the burden of demonstrating a general policy or practice of violating the Act's requirements, not simply a single instance of violation. The Act provides no explicit right for a student to take a school to court to enforce its terms, and, though one court has held that such a right exists under very limited circumstances, other courts and the general sway of legal opinion hold to the contrary.

The Student Consumer Information Regulations are much simpler and less sweeping than the Buckley Act. They derive from a pair of separate concerns that are linked in schools' financial aid policies. On the one hand there was a concern about deceptive advertising practices, particularly on the part of proprietary trade schools. On the other hand there was concern about what appeared to be widespread confusion on the part of college applicants about the nature and extent of available financial aid, much of which was federally funded or guaranteed. The two problems met in the practice of some proprietary schools to make misleading statements about their own financial aid policies and to misuse some of the federal aid programs.

Accordingly, these Regulations take a tentative step towards controlling the minimum information that all schools must make available to potential students. Its primary thrust is to require schools to make clear statements of their financial aid policies and the types of aid available. Secondarily, it requires some data about student attrition rates, and indirect information about placement statistics. The impact of the Regulations is to assure that those institutions that offer federal aid to students will publicize that aid in a way that permits students to

make rational comparisons between schools, and will make available at least minimal information about the students' likelihood of surviving the educational process. Enforcement of the Regulations is implicit in their being a threshold requirement for eligibility for federal aid programs. More importantly, however, additional federal money is made available under the Education Amendments of 1974 to cover the costs of administering the disclosure requirements of the Regulations.

These two examples of federal intervention in the internal workings of colleges and universities cover, to greatly different degrees, both directions of the flow of information. But what is most intriguing about them is that they do so based on radically different conceptual models of the underlying principles on which the law should be based. The differences are evident even in the names of the acts, with one relying on "privacy" rights while the other protects the interests of "consumers".

A PARABLE

Imagine a tribe of hunters and gatherers. They are nomadic, following the herds and the seasons. Food is abundant. For them, land has little meaning in any economic sense. Certainly it is important for them to have general access to their hunting grounds and to the places where their other foods grow. But that is merely a communal need for access to land, not an interest of any sort in land ownership. The notion of land as property, as something that can be controlled, owned, transferred, is alien to them.

This does not mean that land cannot have important value

to some or all members of the tribe. Particular spots may have tremendous personal significance, significance tied to the internal psychology of the individuals involved. Thus, some spots may have religious significance, or they may have social totemic significance to one or more of the tribe's clans, or they may simply be of intense personal import for an individual. A specific spot may be the site of an important hunt, or battle, or ceremony. But these types of importance do not push the tribe in the direction of recognizing property rights. They may call for some sort of social, religious, or legal regulation, but, like the interest in hunting and gathering grounds, they merely call for the policing of access, not the complex definition of rights of use and transfer that typifies property law.

Now suppose that the tribe simultaneously discovers the feasibility of the cultivation of crops and the domestication of animals. If they choose to take up these alternatives to gathering and hunting, their legal system will also radically alter. For both of these endeavors are land-based. They will each lead to (perhaps divergent) social notions of the importance of land, which in turn will almost necessarily lead to the development of property law for the tribe. Where previously the important property had probably been weapons for the hunt, now the most important thing to own is land that is good for farming or for grazing.

Property law--an initial allocation of the right to use specifically identifiable goods (perhaps together with rules for tranferring that initial allocation) and a method of enforcing the initial allocation (and its possible transfer)--property law becomes crucial when a particular commodity takes on a new, tangible

and important social value. And the specific contours of the property law that develops will be determined by the specific nature of the economic value that the commodity takes on. Thus, where grazing is important, grazing rights rather than land ownership become central. Where crop cultivation is most important, complex land ownership rules are the result. Where access to water supply is essential, it is water rights rather than land ownership that develop most fully.

This is a grossly simplified model for the development of property rights out of privacy rights. As commodities shift from having personal or social value to having economic value, the law shifts from protecting communal or private interests to developing a system of property ownership, transfer, use, and enforcement.

A PARADIGM

The kind of radical shift in legal theory described above is currently taking place in the law relating to information. The two laws regulating information flow in universities reflect this perhaps more clearly than any other aspect of the law. There is a movement away from the notion that the control of data should protect the privacy of the persons involved, and towards the notion that information is an important economic commodity. To the extent that it is used as such, the law must come to recognize its value and regulate the marketplace in which it is traded. At the very least, the law must determine an initial allocation of the commodity, and it must develop rules for enforcing and trans-

ferring that initial ownership.

The legal recognition of the value of information is not a sudden occurrence. Some sorts of information have been valued for centuries in the law of copyright, patent, and trade secrets. Other sorts of information value are more recent, emerging from consumer protection law. Thus, it has become clear that the market will not work equitably unless consumers have access to at least a minimal amount of reliable information about competitors' products. Most recently, personal information has emerged as a source of value, particularly since the advent of high speed data processing equipment and sophisticated statistical techniques. These new tools make it possible for information possessors to use data in order to derive a market advantage for themselves.

The relevant legal theories have been adapted to fit the particular source of value and the particular policy goals of the legal system. Thus, copyright, patent, and trade secret law have developed a complex system of regulation over the use of business information. As was the case with the discovery of crop cultivation, mere access protection did not suffice, and legal theories developed that governed rights of use and of transaction.

Consumer protection law runs in precisely the opposite direction. It develops from the same sort of value that I noted with respect to grazing land--there is a need for general, universal access, and the corollary need to enforce such access. For the marketplace to work equitably, consumers must have access to information about products, and they must be able to rely upon the information they receive. It becomes necessary to create something that is not so much an individual property right, but rather a

communal access right.

Finally, personal information might seem to fit either model. It might be viewed as useful in the way that a patent is useful, as a competitive advantage with important value in the market. Or it might be useful as market information is useful, as a way of making the system work more smoothely. In fact, these both collapse into the first of the two. Precisely as patent and copyright law function to encourage invention and research, the legal protection of personal information is the only way to encourage its development and use. Furthermore, traditional privacy notions (as well as other policy goals) also push in the direction of legal recognition of personal information as property, with the accompanying allocation of its initial value.

AN APPLICATION

The discussion of the emergence of information as an economic resource is necessarily general, and inevitably brief. For people engaged in doing research and teaching students, however, it should be particularly suggestive. There should be little question among educators of the value of an idea. There should be little doubt that information itself, however intangible, has a value in excess of the cost of its gathering. And, as recent inquiry into the ethics of human experimentation have begun to suggest, there are appropriate limits to the open accessibility and dissemination of at least some forms of personal data.

Still, we are most used to the university cloister and to a non-business approach to the value of information. And, while

that may be appropriate for research, it is not the way in which personal information is used administratively. Schools use personal data to make decisions that have an impact on the individuals described. Admissions information may be used, indeed often is used, to exclude applicants who supply the information. When universities release or sequester student data such as transcripts based on their own institutional needs, they are making business-like use of personal information.

Withholding a student transcript in order to collect a debt may be reasonable, but it is certainly not an educational judgment. Releasing first year law school grades in order to validate the LSAT test may be in the school's best interest, but, precisely because it <u>is</u> in the school's interest, it is not an objective, arm's-length contribution to research.

In much the same way, decisions about the release and dissemination of information about the institution is a public relations function indistinguishable from that engaged in by other merchants in other markets. The free market economic model may not fit education perfectly, but it would be a mistake to assume that the federal government imposes that model on universities when it passes legislation that leads to Student Consumer Information Regulations. Those Regulations are designed to fit a model that the schools themselves have taken up, a model in which information is not freely disseminated, but rather is rigidly controlled and manipulated.

Once again, in an unregulated educational marketplace the information flow is controlled by only one of the parties.

But having acknowledged that information has economic value, it is impossible to ignore the ramifications of controlling its flow. Whoever controls the flow of information controls its use, and controlling its use controls its value. When one party determines all aspects of the flow of information, it wrings from that information all of its value and draws in that value for its own use.

The point is that the control of information flow is an important aspect of the internal balance of power within a relationship. Schools used to be able to maintain an uneven balance of power because, like parents, they could maintain that their actions were taken in the interest of their charges. But institutional theory has advanced to recognize that the institutions themselves have interests, and that their actions may often be taken to further their own, and not their students', well-being. Where this is the case, the fiduciary responsibility is ignored, and it should not be a surprise that outside regulation becomes appropriate. Admissions decisions, student recruiting, management of campus dormitories, tuition and financial aid policies, the collection of students' indebtedness, these are the areas in which student information is used. And these are all areas in which schools act in their own interests, interests that may often be antagonistic to those of at least some of their students.

TWO LAWS, AGAIN

It is not surprising that when universities act as businesses the law treats them as such. Their building plans are

subject to city zoning regulations, their incinerators are subject to environmental regulations, their kitchens to health laws, their dormitories to housing codes, their agents to the requirements of all applicable laws. And so it should not be surprising that the flow of information should be regulated here as elsewhere.

The intriguing aspect of the two laws regulating university information flow, however, is that they reflect the uncertain state of information regulation in general. One, the Buckley Act, relies on a privacy model, embodying the old and increasingly inappropriate way of looking at personal data. The other focuses on a consumer model, reflecting the nascent awareness of the economic valuation of information.

Thus, the Buckley Act, like most privacy regulations, and like the land regulation of the pre-agrarian society I sketched above, controls access, not use. It is preoccupied with permitting individuals with a personal interest in the commodity to regulate their own and others' access to it. It is predominantly a protection of personal feelings, not of economic value. As a result, there is virtually no protection in favor of increased access. That is, students are permitted to regulate access, not value. They can keep others out, but they cannot stop the school from its own use of the data it already possesses, and they cannot force the school to give over the information to third parties. Students may protect their privacy interests, but the economic value of the information is ignored.

In contrast, the Student Consumer Information Regulations espouse a clear market orientation towards the regulation of information flow. Here, in an area where information has already

been acknowledged to have economic value, the law itself treats information flow as an economic concept. It validates the importance of access to market information, and it requires that at least some minimal threshold level of information be made available.

The legislative histories of the two acts differ accordingly. The earlier one reflects a concern for privacy interests, a fear of improper revelation, of the making public of personal material. The horror stories told about student records were about violations of personal privacy, about irrelevant or misleading data following an individual through school and on out into the world, being passed from school to school, and ultimately to an employer, without the individual ever knowing what was being whispered in the wings. The more recent act responds to a different sort of concern, a concern that students are unable to make informed market choices, that they are being deceived by at least some of the proprietary schools, that they cannot plan the finances of their education adequately without being able to make viable market judgments.

But, though the acts are very different in thrust, the underlying issue is really quite similar. It derives from the unilateral control of information that typifies the student-school relationship, and from the uneven balance of power that that creates.

SOME CONCLUSIONS

I began by observing several paradoxes in the treatment

of administrative information by universities. The discussion that followed may not have made the paradoxes any less troublesome, but it should at least have cast some light on their source.

The fundamental problem is that certain types of information have important economic value to educational institutions. Because of this there develops a conflict of interests, a collision between the schools' fiduciary responsibility for their students and their institutional responsibility to survive and, if possible, thrive. The clash is not unlike the one that many schools have experienced over the last several years regarding endowment investment policies. Should the institution do well? Or should it do good?

History seems to suggest that, where the control of information is concerned, most schools chose to opt for the former. Prior to regulation, virtually all schools maintained absolute domination of the flow of administrative information between their students and themselves. This fact alone should explain the recent imposition of outside regulation, and should vitiate schools' claims that such regulation somehow interferes with their educational function.

Where difficulty remains is in the law itself. While it has responded to a problem that is one of economic valuation, of sociological distribution of power, that response has not consistently been phrased in the terms of the problem. By focusing attention on privacy rather than power, on access rather than flow, legislation like the Buckley Act diverts our attention from the actual nature of the underlying difficulty. Until the legal remedy more closely fits the nature of the ailment, the paradoxical

symptoms will continue to cause trouble.